

OFFICE OF HEARINGS AND APPEALS WEEKLY REPORT

March 27, 2009

Decisions Issued:

Personnel Security (10 CFR Part 710)

On March 23, 2009, an OHA Hearing Officer issued a decision in which he concluded that an individual's access authorization should not be restored. A DOE Operations Office referred the matter to administrative review citing the individual's history of alcohol use and incidents of domestic violence. After conducting a hearing and evaluating the documentary and testimonial evidence, the Hearing Officer found that the security concerns remain unresolved. In making his determination, the Hearing Officer noted that the individual had only recently begun to acknowledge his problems with alcohol and had not sought treatment for those problems. Citing the testimony of a DOE consultant psychiatrist, the Hearing Officer found that these steps were necessary in order to sufficiently mitigate the risk that the individual would drink to intoxication in the future. The Hearing Officer also found that, while the risk of future domestic violence incidents appears to be reduced, there remains an ongoing concern regarding the individual's lack of judgment under stress. OHA Case No. TSO-0689 (Steven J. Goering, H.O.)

On March 20, 2009, an OHA Hearing Officer issued a decision in which she concluded that an individual's access authorization should be granted. The background investigation of the individual revealed that he previously held a DOE security clearance, but that it was terminated in 1996 when he was fired for twice testing positive on random drug tests. During the hearing, the individual testified that he had not used drugs in thirteen years, and presented corroborating evidence of several years of clean drug test results. Various witnesses testified that the individual had reformed his behavior and was now an honest, responsible person with a good reputation in the community. In addition, a clinical psychologist testified that the individual did not suffer from substance abuse or dependence, and that the individual had a low probability of illegal drug use in the future. After evaluating the documentary and testimonial evidence, the Hearing Officer found that the individual had mitigated the security concerns regarding his previous drug use. She further found that the individual had mitigated the security concern regarding his dishonest conduct (specifically, his use of illegal drugs while holding a clearance) by the passage of time and also by his honesty in confronting his drug use and successfully reforming his behavior. OHA Case No. TSO-0686 (Valerie Vance Adeyeye, H.O.)

Appeal

On March 25, 2009, OHA issued a decision granting in part a Freedom of Information Act (FOIA) Appeal filed by the Environmental Defense Institute (EDI). EDI filed a request with Idaho for documents referring to the Advanced Test Reactor (ATR) that were referenced in DOE/Idaho National Laboratory (INL) "Certification Report No. 29." Idaho released a number of documents to EDI in full, but withheld portions of eight documents relying on FOIA Exemption 2. In addition, Idaho withheld a portion of one other document under

FOIA Exemption 4. EDI challenged these withholdings. In considering the Appeal, OHA found that Idaho properly withheld the redacted information under Exemption 2, but that Idaho had not adequately justified its withholding under Exemption 4. OHA therefore remanded the matter to Idaho for a new determination. OHA Case No. TFA-0298

Application for Exception

On March 23, 2009, OHA issued a decision denying an Application for Exception filed by Dobrauc Oil Co., Inc. (Dobrauc). In its submission, Dobrauc sought to be permanently excused from the requirement of filing Form EIA-782B, entitled “Resellers’/Retailers’ Monthly Petroleum Product Sales Report.” In support of this request, the firm averred that it had been filing the form for over 10 years. In its decision, the OHA stated that the length of time that a company had been filing the form was not a sufficient reason for exception relief. OHA further concluded that Dobrauc had not shown that it is burdened by the filing requirement to a significantly greater extent than other small vendors, especially in light of the firm’s statement that it spends only 30 minutes per month completing the form. OHA Case No. TEE-0058

Whistleblower (10 CFR Part 708)

On March 29, 2009, an OHA Hearing Officer issued a decision granting a Motion for Summary Judgment filed by ENVIRO AgScience (EAS), relating to a complaint filed against EAS by James J. Myers (complainant), a former EAS employee, under the DOE’s Contractor Employee Protection Program, 10 CFR Part 708. EAS, a subcontractor at the DOE Savannah River Site, had hired Mr. Myers as a lawn equipment operator. In his complaint, Mr. Myers alleged that EAS terminated him in June 2008 because he brought to management’s attention a “potential safety concern regarding work-related duties in the use of a certain piece of equipment [a walk-behind lawn mower] on May 1, 2008.” However, upon review of the uncontested facts presented in the record, the Hearing Officer found that the complainant had stated only that the walk-behind mower was “unfamiliar” and that he “ran it as fast and safe as he would with others and his safety in mind.” Thus, the Hearing Officer concluded, as a matter of law, that Mr. Myers could not prove that he had a reasonable belief that his disclosure revealed “a substantial and specific danger to employees or to public health or safety” under Part 708. Accordingly, EAS’ motion was granted and the complainant’s complaint was dismissed. OHA Case No. TBZ-0083 (Kimberly Jenkins-Chapman, H.O.)